

to be shot and did in fact incite the crowd to kill these airmen then I submit that he is guilty up to the hilt in this case.

In opening the case I took once more an imagery from British law when I referred to an instigator being regarded as a principal. In my submission the same holds good for this case. If a man incites someone else to commit a crime and that crime is committed, although the person who incites was not present when the crime was committed he is, in my submission triable and punishable as a principal, if you find that he did so incite. In my submission whether this trial takes place under British law or, as it is doing now, under the Regulations for the Trial of War Criminals, if you are satisfied that Hauptmann Heyer incited the crowd to kill these three men and if you are satisfied that these three men were killed as a result of that incitement then you are perfectly entitled to convict him as being concerned in their killing.

I do not propose to go any further into the evidence. You have heard it at great length over four days and the matter is now left in your hands.

THE PRESIDENT: The Court will close now to consider the finding. As a matter of convenience the Court will reassemble to-morrow at 1130 hours. If it is not ready to reassemble then an announcement will be made at that time.

(At 1705 hours the Court is adjourned until 1130 hours to-morrow Saturday 22nd December 1945).

FIFTH DAY.

Saturday 22nd December 1945.

(At 1130 hours an announcement is made that the Court will reopen at 1415 hours).

(At 1415 hours the Court reassembles, the same President and Members being present).

(The accused are again brought before the Court).

THE PRESIDENT: Erich Heyer, the Court find that you are guilty of the charge.

Peter Koenen, the Court find you guilty of the charge.

Johann Braschoss, the Court find you guilty of the charge.

Karl Kaufer, the Court find you guilty of the charge.

Franz Hartung, the Court find you not guilty of the charge.

Hugo Boddenberg, the Court find you guilty of the charge.

Erich Sambol, the Court find you not guilty of the charge.

The findings which I have announced of guilty are subject to confirmation. Franz Hartung and Erich Sambol will now be removed from the Court and will be kept in custody.

Major Stone, at this stage would you like to address the Court in mitigation on behalf of the accused?

worn by a captain and by a serjeant is not very great and it is quite possible to mistake it. I do not feel convinced that their identification of a German officer who said these things, who was not known to them before, is a particularly good one, particularly when Koenen, who was in at least as good a position to see and hear what went on as Schmidt or Lipsinski, said he did not utter any such remarks.

On the other hand, there are three witnesses, Weise, Frau Giese and Dieckmann, who all report words used by Heyer on this subject. Dieckmann says not that he said anything to civilians but that he heard him say to Serjeant Groosse: "The airmen will be shot". It is not said at what precise moment of time he heard him say that. Admittedly Heyer himself spoke to Groosse and gave him certain orders. He reminded the escort, amongst other things, of their rights in the use of their weapons against prisoners of war. He told them, as was in fact their right, that if any of these prisoners tried to escape they could be shot. I suggest to you that since all that Dieckmann says is that he heard this one remark completely in the blue, "The airmen will be shot", which by itself does not make very much sense, what he might well have overheard, since Heyer was not speaking to him, was part of the instructions to the serjeant-major as to the conditions in which these two men in the escort were allowed to shoot at the prisoners.

Weise says again that Hauptmann Heyer spoke to Hauptmann Abel about what to do with the prisoners and he made the remark that they should be shot. There was some difficulty, you remember, about what exactly he meant when he said that, whether it was an expression of opinion as to Allied airmen in general, perhaps, and these three in particular, that they should be shot, or whether it was an expression of something which was in fact going to happen in the future. Again, since this remark was not addressed to Weise in particular and was again part only of a conversation overheard by him, I suggest that this may have been part of the same conversation reported by Heyer between himself and his serjeant-major and Unteroffizier Nelges as to the conduct of this escort and their rights towards the prisoners if any of them should try to escape. Once more this statement, according to Weise, was not made in the presence of any civilians whatever. It was made in the yard in the presence of soldiers and policemen only.

The last witness was Frau Giese. She again says that she heard a German officer address the crowd and say that he handed them over to the civilians and gave them the right to lynch them. She again is a woman who did not know Heyer before this day, who had probably never seen him before and who certainly did not know his name; and again it is possible that she was mistaken in her identification, mistaken even perhaps in what she heard.

Finally I want to deal with a few general points. I have felt throughout this case that one of the major difficulties is what exactly is meant by this charge of being concerned in the killing of these airmen. Unless one is very careful, a charge so widely phrased as this is going to sweep into its net almost everybody who was ever near the airmen on this particular day. If my learned friend proposes to maintain that anybody in the crowd about the airmen when they were killed is in some measure responsible for the death of the airmen which ultimately took place, then it seems to me that that net is spreading so wide that almost every one of the witnesses who have been called for the Prosecution might very well be put in the dock too on the ground that they were there and they were part of this same crowd which ultimately was responsible for the airmen's death.

It seems to me that the word on which we must fasten is the word "killing". I am not suggesting that the word "killing" in this context means what "murder" means in English law. Killing is a matter of physical fact; either you kill a man or you do not; there are no half measures. There has been no evidence whatever about any of these Accused that any one of them is responsible for physically having put an end to the life of these three airmen. Some of them have been said by two, three, four or five witnesses to have beaten the airmen; not one of them has been said to have

taken any part in the ultimate act, whether it be throwing over the bridge or the shooting of a gun that put an end to the life of these three men.

Are we to cast this net so widely that a man perhaps like Boddenberg, who strikes two or three blows which may or may not have hit the man, is to be put on the same footing as a man like Nelges, who admittedly fired 12 or 15 rounds at the airmen, or as a man like Kircher, who was directly identified by a large number of the crowd as having actively himself with his own hands thrown one of the airmen over the bridge? That physical act of ending a man's life must surely be the essential of this charge.

There is one other point. In English law in any crime it is essential to prove not only that a man did something physical but that he intended to do what he did. Against the five civilians here no evidence has been offered of their intention to kill. Sambol was so little interested in what ultimately happened to these airmen that after hitting one of them twice he went home. Not only did he not follow the crowd to see what happened, but he apparently did not even ask what had happened afterwards. Of Hartung it was said that he came on to the bridge towards the end and he did not even look over the side to find out what had happened. Boddenberg himself says that he had no intention of killing the airmen and that, after in a blind fit of rage he had hit at them once or twice, he realised that what he was doing was shameful and he went away.

Again, against Kaufer there is no evidence of his intention to kill, unless the story of Fritz Conradshaus about the rifle be accepted; against him, apart from that, there is no evidence.

Nor is there any evidence against Braschoss, against whom no evidence has been given of any intention to end the lives of these three airmen.

Some of the Accused, it is agreed, have been said to have maltreated the airmen, to have hit them, perhaps to have caused them pain; but none of them has been shown to have taken any part in the physical act of ending their lives or ever having had any intention to do so.

MAJOR TAYLOR: May it please you Sir and Members of the Court. You have just heard a most eloquent and excellent speech for the defence which, if I may be permitted to say so, has put forward everything that could possibly have been put forward for these men; but I feel in some instances the speech was not altogether in accordance with the facts as I shall present them to the Court.

It is four days since the charge was read out and I feel that it would not be inappropriate for me at this moment to read it once more. These seven men are accused of "Committing a War Crime in that they at Essen-West on the 13th December, 1944 in violation of the Laws and Usages of War were, together with the four named men who are not before the Court and other persons unknown, concerned in the killing of three unidentified British airmen prisoners of war." You have heard that that charge is a somewhat wide net and that it is not as clear as it might be what the exact import of the charge is. I want there to be no mistake whatever as to what the prosecution allege in this charge. When I opened this case on Tuesday I used the word "murder". As the Legal Member pointed out it is quite true that as this is not a case of a killing of somebody who at the time was under the King's Peace, and murder is a word connected with the law of England and not with the Laws and Usages of War, that was in a sense an illustration. The prosecution's case is that they have brought before you exactly the same evidence that they would bring on a charge of murder bearing in mind that in England on a charge of murder it is open to the Court to find a verdict of manslaughter. In my submission if you have evidence which would justify you in England in finding any of these accused guilty of either murder or manslaughter then the prosecution, if they have satisfied you of that, have satisfied you that the accused are guilty within the meaning of this charge.

My friend has spoken to you about the intent which is necessary and he says that no evidence of intent to kill has been brought before you. In my submission there has been considerable evidence of intent to kill; but even if there were not, in my submission to prove this charge you do not have to prove an intent to kill. If you prove an intent to kill you would prove murder; but you can have an unlawful killing, which would be manslaughter, where there is not an intent to kill but merely the doing of an unlawful act of violence. A person might slap another's face with no intent to kill at all but if through some misfortune, for example that person having a weak skull, that person died, in my submission the person striking the blow would be guilty of manslaughter and that would be such a killing as would come within the words of this charge.

In my submission therefore what you have to be satisfied of - and the onus of proof is of course on the prosecution - is that each and everyone of these accused, before you can convict him, was concerned in the killing of these three unidentified airmen in circumstances which in British law would have amounted to either murder or manslaughter.

Turning to the question of the Laws and Usages of War there is one preliminary observation I should like to make and I should like to refer to the Manual of Military Law. I first wish to refer to page 16 of Chapter XIV of The Laws and Usages of War, where in paragraph 59(c) referring to prisoners of war it says: "They shall be humanely treated and protected particularly against acts of violence, from insults and from public curiosity."

In my submission therefore it is quite clear that once a man has been taken prisoner it is the duty of the power which takes him prisoner to safeguard his life and limb.

With regard to the question of superior orders being a defence my friend has admitted that in law that is not a defence to a war crime provided that the order is to do an act which is in the conscience of the world wrong. I do not think that there is any dispute that the order to an escort not to protect a prisoner from the fury of the mob is an act contrary to the conscience of the world.

So much of the generalities in this case. With regard to the facts I think that probably the best picture of what actually did take place was given not by any of the witnesses for the prosecution but by the accused Peter Koenen when he told us what happened. He was the only man we know who was there the whole time and he has given us a picture from the start to the tragic end of this journey from the barracks to the bridge. He has said that there were some twenty five to thirty people in the street outside the barracks, that this walk which should have taken ten to twelve minutes to the bridge took about half an hour, that people were streaming out all the time and adding to the crowd, that for practically the whole way people were striking, beating and cursing these airmen and finally when they got to the bridge he put the number of the crowd there at 160 or 170 persons. I think that that will give the Court from the only man who is admittedly an eye witness the whole time a very clear picture and a very horrible picture of what these three airmen went through.

Going back for one moment to the question of how wide the net of the charge is, my friend was asking if it included everybody who was in that crowd and saying that that would rope in most of the prosecution witnesses. That is not the allegation of the prosecution at all. The allegation of the prosecution is that although it may be said there were three stages in this killing, starting with the incitement at the entrance to the barracks, continuing with the beating, which was the second stage, and finally the throwing over and the shooting which was the third stage, in my submission from the very start when the incitement to the crowd to lynch these men came from Heyer and, if you will forgive me using the same metaphor I used before "Heyer lit the match", each person who struck a blow was putting flame to the fuel which was this enraged populace, and finally the explosion came at the bridge; and therefore the allegation of the prosecution is that every person who, following the incitement to the crowd to murder these men, voluntarily took aggressive action against any one of these three airmen is guilty in that he is concerned in the killing. It is impossible to separate any one of these acts from another; they all make up what is known as a lynching. In my submission from the moment they left those barracks those men were doomed and the crowd knew they were doomed and every person in that crowd who struck a blow is both morally and criminally responsible for the deaths of those three men.

Passing to the individual evidence against the accused I will deal with it in the same order as my learned friend adopted. First there was Sambol. The evidence against him consists in the statements of Frau Schmidt and Frau Lipsinski, one of whom said she saw several blows struck by Sambol and the other says she saw one. There was no allegation that they were particularly violent blows, but the important thing is the allegation that they were either the first or some of the first blows which came directly after the instigation from Heyer to lynch these men.

In my submission the evidence of those two witnesses should be taken as a whole because their allegations are not only against Sambol but also against Heyer. What they say about Heyer is confirmed by a completely independent witness, Klara Giese, and if they are right over that with independent confirmation do not you think they are also likely to be telling the truth about the other element of their evidence as it concerns Sambol.

If you are satisfied, as of course you must be before you can convict him, that Sambol did in fact strike those blows, I repeat what I said in answer to my learned friend's submission, that he was the first match which set the fuse alight and while he may not at that time have appreciated what an explosion was going to come at the end he was concerned in their killing in that he struck the first blow or one of the first blows and started off the train of tragedy. I do not wish to say anything more about him.

Next we have Hugo Boddenberg. I feel that you may possibly share my own feelings of some respect for Hugo Boddenberg as the only man in this Court who has had the honesty to get up and admit that he did strike one of the airmen. One began at one time to think from the evidence that these airmen must have thrown themselves over the bridge because no one would admit that a blow was struck at all or that anybody had done anything; but Boddenberg has had the honesty, although there was only one witness against him, to admit that he did strike a blow. He has told you that he approached the bridge, that when he got to the bridge one of the airmen had already been thrown over and that people were attacking the other two and that in a moment of temper he joined in and struck some blows with his belt and then desisted. He says that after he had desisted he heard shouts of "Kill them" and "Throw them over the bridge" but that he did not hear any of those shouts before. You may think that is rather strange that on approaching the bridge, even after the first airman had been thrown over, he should not have heard any shouts; but that is a matter for you Sir and the Members of the Court. The fact remains that he has admitted that he did strike a blow at these airmen, amongst others, after one of them had been thrown over the bridge; and in my submission he must have known that the motives of the crowd against them were deadly, and yet he joined in. As he says, it was in a moment of temper and he desisted. If you believe that no doubt it is a matter which you will properly take into consideration when considering what the punishment should be; but in my submission on his own confession he must be convicted of being concerned in this killing.

With regard to Hartung you will recall, as my learned friend said, that the witness against him was Agnes Hartmann; an old lady of seventy four, and my friend suggested that she was not a particularly reliable witness. You saw her give evidence in the witness box and you also saw the way in which she picked out that accused; she had no hesitation in doing so. You will remember what her evidence was, that she saw Hartung hitting one of the airmen with a rubber stick and that after a few blows somebody grabbed it away from him; that he then ran away from the bridge and came back a few minutes later carrying a hammer.

You will remember the evidence of Anna Fricke. She says that she saw Hartung coming towards the bridge with a hammer. She had not seen him earlier; but that at any rate completely corroborates what Frau Hartmann said, that she saw him coming with a hammer. If she is corroborated on that second part of her evidence why should she be mistaken about the first part?

What does Hartung say himself? He tells you that he was repairing his house which is about one hundred and fifty metres from the bridge, that until somebody told him there was something going on on the bridge he had not the faintest idea that anything was going on there, he had not heard shouts, he had not heard shots, he did not know the slightest thing was going on - and by that time the cavalcade had passed on to the bridge, there had been, if you accept Koenen's estimate, one hundred and fifty people or more fighting on the bridge, a number of shots had been fired and these three airmen had been thrown over; and yet Hartung had not heard a single shot from his house one hundred and fifty metres away. Can you believe that? In my submission the noise of what was going on on that bridge on that morning must have aroused the whole neighbourhood. Can you believe that a man one hundred and fifty metres away did not know what was going on at all? It is a matter entirely for you; you have seen the witnesses and it is on the evidence that you must consider it.

Passing to Kaufer you will remember what the evidence against him is. There is the evidence of Fritz Conradshaus who told us that he saw Kaufer and Braschoss fighting in the crowd. Annamarie Conradshaus also told us that she saw Kaufer beating the airman, and you have the evidence for what it is worth of Edmund Hartmann's affidavit who says "People told me that Kaufer took an active part." That is only

hearsay and you may think it is of small value except that it does corroborate what the two women witnesses have said. Then there is this further allegation against Kaufer that he tried to pull the rifle away from the unteroffizier to shoot the airmen below the bridge and that he called out words to the effect that they were the people who had caused misery to their wives and children and should be shot. You have heard his explanation of that and how he says there were two incidents, one while they were still on the bridge and one afterwards and that this was the second incident. Does that convince you? If it does he should of course be given the benefit of it.

My friend went on to say "Of course he is corroborated by his wife." That is precisely what he is not because his wife flatly denied that there was this second incident on the bridge afterwards. Finally she admitted that she was not by his side all the time and therefore might not have noticed it. In my submission his wife's evidence on that point carries the case no further whatever.

A certain amount of doubt was cast upon the validity of Fritz Conradshaus's evidence. An allegation was made that perhaps he was giving false evidence because a friend of his coveted Kaufer's house. You will remember that Conradshaus, had he been anxious to do a bad turn to these accused, had got opportunity; but he was an extremely reluctant witness to say anything against them. In fact it was not until I obtained the Court's permission to treat him as a hostile witness that he did come out with the evidence against these people and we then learned about this little book of his in which he had been sufficiently interested to write down details only a fortnight after the incident happened; and if he were anxious to do these people a bad turn and manufacture his evidence against them would he have had to have been forced to the extent of being treated as a hostile witness in Court before he would bring it out?

With regard to Braschoss you have five witnesses all of whom in one way or another implicate him in the affair on the bridge. You have Heinz Lober, and Inge Lober, the brother and sister both of whom say that they saw Braschoss striking the airman on the bridge. Fritz Conradshaus also says that he saw him hitting the airman on the bridge. You will remember he further told you that Braschoss went down under the bridge and that Braschoss asked him to help him throw the body into the stream and when he refused Braschoss and some others threw it in themselves and that the airman at that moment was still alive because air bubbles were coming from the blood on his nostrils.

You have heard the evidence of Annamarie Conradshaus who also states that she saw Braschoss beating the airman. You have the affidavit of Edmund Hartmann who goes so far as to say in that that he saw Braschoss and Kircher actually throwing one of the airmen over the bridge. That is five statements on oath, four that you have heard in Court and one affidavit.

Braschoss has denied it. It is entirely a matter for you whether you believe the witnesses for the prosecution or whether you are not satisfied that they are telling the truth or that they are being accurate. If you have any reasonable doubt Braschoss is entitled to the benefit of it. If you have not I submit that he is one of the ringleaders in this affair.

With regard to Peter Koenen his position in this whole business was a somewhat difficult one and he was in a position which I do not expect any of us would have liked to have been in: a case where his military duty and his conscience must have conflicted. He was given an order not to interfere and he did not interfere. He stood by while these three airmen were murdered. Mere inaction on the part of a spectator is not in itself a crime. A man might stand by and see somebody else drowning and let him go and do nothing; he has committed no crime.

MAJOR STONE: I only want to say a very few words. I have very little to add to what has already appeared in the evidence. I would like to say this, that you Sir, and the other Members of the Court have been living now in Essen for almost a week. In your travels to and from this Court, to and from the bridge and in other parts of the town you have seen the state in which this city which once held some seven hundred and fifty thousand inhabitants is. I am not forgetting why it is in that state, I am not forgetting that there has only happened to this town what has happened to some of our towns and to other towns in Europe and that it was not we who started this war. But I do suggest to you that even if the state of this town, the ruin of all these buildings, the misery which was undoubtedly caused to its inhabitants, is not an excuse or a justification for what these men have done, I suggest that at least it may perhaps make us understand the background of their acts and what it was that drove them to it. That is all I have to say.

THE PRESIDENT: Major Stone, do you wish to call any witnesses as to character?

MAJOR STONE: No, I have no witnesses as to character.

THE PRESIDENT: Erich Heyer, is there anything that you would like to say to the Court ?

THE ACCUSED HEYER: Yes, I am innocent regarding the evidence of the five denouncers. I am guilty because I did not give the order to the escort to shoot at the civilians in case they should attack. I beg the Court to allow me to take the punishment of my former soldier Peter Koenen on my shoulders as he is a father of ten children between six months and sixteen years of age. I beg the Court to give me permission to speak to my wife once more.

THE PRESIDENT: Is there anything else you wish to say ?

THE ACCUSED HEYER: No.

THE PRESIDENT: Peter Koenen, is there anything you would like to say to the Court ?

THE ACCUSED KOENEN: No.

THE PRESIDENT: Johann Braschoss, is there anything you would like to tell the Court ?

THE ACCUSED BRASCHOSS: Also I feel that I am innocent. The evidence of the witnesses, the denouncers is absolutely untrue.

THE PRESIDENT: Do you wish to say anything else ?

THE ACCUSED BRASCHOSS: No.

THE PRESIDENT: Karl Kaufer, do you wish to say anything to the Court?

THE ACCUSED KAUFER: I am innocent. The two denouncers told lies. Three of my relatives were soldiers on the Allied side. Therefore it is impossible that I could ever hit a British airman. That is all.

THE PRESIDENT: Hugo Boddenberg, is there anything you would like to tell the Court ?

THE ACCUSED BODDENBERG: No.

THE PRESIDENT: The Court is now closed to consider the sentences.

(At 1430 hours the Court is closed)

(At 1450 hours the Court re-opens)

(The accused are again brought before the Court).